# No. 12,333

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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ARCADIO CABEBE,

*Appellant,*

vs.

DEAN ACHESON, Secretary of State of the United States of America,

*Appellee.*

**Upon Appeal from the District Court of the United States for the Territory of Hawaii.**

## BRIEF FOR APPELLEE.

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### OPINION BELOW.

The opinion of the District Court (R. 13) is reported at 84 F. Supp. 639.

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### JURISDICTION.

The jurisdiction of the United States District Court for the District of Hawaii in this case was founded (R. 13) upon Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U.S.C. 903. The judg-

ment of that Court was entered June 23, 1949 (R. 17). An extension of time for appeal was obtained by the appellant on July 26, 1949 (R. 20) and notice of appeal was filed July 28, 1949 (R. 20). The jurisdiction of this Court is founded upon Sections 1291 and 1294 of Title 28 U.S.C.

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**STATEMENT.**

This action was brought by the appellant under Section 503 of the Nationality Act of 1940, 8 U.S.C. 903, for a judgment declaring him to be a national of the United States and as such entitled to the rights and privileges of a national of the United States. The facts as they have been succinctly stated by the District Court (R. 13, 14) and stipulated by the parties (R. 35), are that the appellant was born in the Philippine Islands in 1910, came to the Territory of Hawaii in 1930, resided continuously in Hawaii ever since, is not a United States citizen, that Congress passed an act entitled "The Philippines Independence Act", March 24, 1934, Ch. 84, 48 Stat. 456, 48 U.S.C. 1231 et seq., and that pursuant to that Act the independence of the Philippines was proclaimed by the President on July 4, 1946, Proclamation No. 2695, 60 Stat. 1352.

The question raised by these facts is:

Did the appellant lose his status as a "national of the United States" within the meaning of Section 101(b) of the Nationality Act of 1940, 54 Stat. 1137,

8 U.S.C. 501(b), and become an alien when the independence of the Philippines was proclaimed by the President on July 4, 1946?

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**SUMMARY OF ARGUMENT.**

The District Court through the Honorable J. Frank McLaughlin, correctly held (R. 15, 16) that as a matter of law the foundation for the appellant's United States nationality status vanished when the place of the appellant's birth became a new, independent and sovereign nation, namely, the Republic of the Philippines. This also was the conclusion, by way of *obiter dictum,* of the other division of the District Court, the Honorable Delbert E. Metzger presiding, in the *Application of Rabaul Viloria,* reported at 84 F. Supp. 584, 586 (1949).

The Congress of the United States made any person who is a citizen of the United States or who, though not a citizen of the United States, owes permanent allegiance to the United States and who is not an alien, a "national of the United States." Nationality Act of 1940, Section 101(b), *supra.* G. H. Hackworth[1] in discussing the difference between nationality and citizenship quotes as follows from a decision of the Mixed Claims Commission:

> "* * * 'National' and 'nationality' are broader and apter terms than their accepted synonyms

[1]Hackworth, Green Haywood, Legal Adviser of the Department of State.
*Digest of International Law,* Vol. III, p. 5, Washington, 1942.

> 'citizen' and 'citizenship.' Nationality is the status of a person in relation to the tie binding such person to a particular sovereign nation. That status is fixed by the municipal law of that nation. Hence the existence or nonexistence of American nationality at a particular time must be determined by the law of the United States * * *."

Congress in setting the standards for United States nationality status could not bind successive Congresses which could either change those standards or change the status of a particular group of people so that they no longer qualified under those standards.

The act granting United States nationality status to all those not aliens and not citizens who owe permanent allegiance to the United States gave such persons no vested interest in that nationality status. This act is in the nature of a gratuity or privilege which can be withdrawn at any time. *In re Chae Chan Ping,* 130 U.S. 581, 609, 610 (1889). The granting of independence to the Philippines thereby making persons born in the Philippines who had not acquired citizenship from other nations citizens of the Republic of the Philippines, also referred to as the Commonwealth of the Philippines, did not divest such persons, who had until that time possessed United States nationality status, of a property right without due process of law. It is clear Congress intended that from the date the independence of the Philippines was proclaimed, all citizens of the Philippines should be regarded as aliens.

By the decision of the District Court, the appellant has sustained no substantial hardship. If he is qualified, he can seek full-fledged citizenship with all its perquisites through the medium of naturalization, and if he desires to travel, the necessary documents can be procured from the government of the Republic of the Philippines.

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## ARGUMENT.

### I. IT IS FOR EACH STATE PRIMARILY TO DETERMINE WHAT PERSONS IT WILL TREAT AS NATIONALS THEREOF.

Otherwise expressed, the nationality status of any person is dependent upon the law of the nation whose nationality he claims.[2] Hackworth has ably pointed out the confusion between the terms "citizenship" and "nationality,"[3] and it is apparent from the appellant's citation of cases that he considers citizenship and nationality vested and equal rights. Congress never intended to give to citizens of the Philippines the status of citizens of the United States. 23 *Op. Atty. Gen.* 370.

Rights created by statute may be modified or withdrawn, *Norris v. Crocker,* 54 U.S. 429, 439 (1851); *In re Chae Chan Ping,* 36 Fed. 431, 433 (1888) aff'd. 130 U.S. 581 (1889), and Congress in prescribing standards of eligibility for United States nationality could not bind successive Congresses, which had the

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[2]Hackworth, Id., Vol. III, p. 5. VI Temple Law Quarterly, 451, 462.

[3]Hackworth, Id., Vol. III, pp. 1-3.

power at any time to change those standards, *Fletcher v. Peck,* 10 U.S. 87, 133 (1810); *Lynch v. U.S.,* 292 U.S. 571, 581 (1934). If by statute a right or privilege is granted subject to certain conditions, all those conditions must be met before the applicant can enjoy the benefits of the claimed right or privilege. *U.S. v. Maney,* 21 F. (2d) 28, 29 (1927) aff'd. 278 U.S. 17 (1928). The appellant as a citizen of the Republic of the Philippines and therefore an alien as far as the United States is concerned, fails to meet the requirements for United States nationality status.

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**II. UNDER THE LAW OF THE UNITED STAES, NON-CITIZEN PERSONS BORN IN THE PHILIPPINES ARE ALIENS.**

In the United States, the common law rule of *jus soli*—citizenship follows birth—has been applied.[4] The appellant therefore until July 4, 1946, when the independence of the Philippines was proclaimed by the President, was a citizen of the Philippines and a national of the United States. After the proclamation of independence, he became a citizen of a sovereign, independent state, and consequently, with relation to the United States, an alien, Act of February 5, 1917, Ch. 29, Sec. 1, 31; 39 Stat. 874, 897, as amended June 2, 1924, Ch. 233; 43 Stat. 253; 8 U.S.C. 173; *Low Wah Suey v. Backus,* 225 U.S. 460, 473 (1912).

The question of what changes are effected in the nationality of a person when the area in which he is

[4]Hackworth, Id., Vol. III, p. 8.

born and of which he is still a citizen changes hands either through conquest, by cession, or by the granting of independence to such area has been the subject of but little editorial comment and has been but infrequently reviewed by American courts. Herbert Hugh Naujoks in an article published in the Temple Law Quarterly stresses the factor of allegiance as does the Nationality Act of 1940 in the determination of a person's nationality:[5]

> "478: Lord Coke described the tie of allegiance or nationality as *duplex et reciprocum ligamen,* involving the duty of obedience on the part of the subject and protection on the part of the state. (Calvin's Case, 1608, 7 Coke's Rep. 1, and 276) This tie has always been considered by the will of the sovereign. Hence allegiance may be dissolved by complete conquest, by cession or by secession recognized by the former sovereign. However, a distinction should be drawn between the annexation of territory upon the conclusion of a war either through the cessation of hostilities or by a treaty of peace. Where territory is occupied during a war a complete title is not acquired, since so long as hostilities continue, the conquered government does not relinquish its claim to the occupied territory. Where, however, territory has been ceded by a treaty of peace, the old government expressly, and where hostilities merely cease, the old government tacitly cedes such conquered territory to the new government."

That it was the intention of the Congress to make aliens of all Filipinos who were not citizens of the

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[5]VI Temple Law Quarterly 451, 478 (June 1932).

United States is clearly borne out by the provisions of the Philippine Independence Act of March 24, 1934, *supra.* In Section 8 of that Act, 48 U.S.C. 1238 (a)(1),[6] it is provided that for the purpose of laws relating to "immigration, exclusion, or expulsion of aliens, citizens of the Philippine Islands who are not citizens of the United States shall be considered as if they were aliens." The use of the phrase "who are not citizens of the United States" reveals that Congress considered the United States nationality status of non-citizen Filipinos at an end, and the extension of the provision to cover "expulsion" shows that it was designed to apply to non-citizen Filipinos residing both within and without the United States. By Section 14 of the Philippine Independence Act of March 24, 1934, 48 U.S.C. 1244,[7] all the immigration laws of the United States are made applicable to persons born in the Philippine Islands.

As indicated above the nationality status of non-citizen Filipinos residing in the United States which is raised directly in the instant case has been only a matter of indirect discussion in other cases. This Court in the case *Del Guercio v. Gabot,* 161 F. (2d) 559, 560 (1947) which involved the attempted deportation of a non-citizen Filipino, said:

> "Philippinos, residing in the United States during the period from the cession of the Philippine Islands to the United States and the establishment of Philippine independence, were of an uncertain status. They were not citizens of the

[6]See Appendix.
[7]See Appendix.

> United States, but because the United States exercised sovereignty over the Islands and their inhabitants, they are said to have been United States nationals and not aliens. The Independence Act (48 U.S.C.A. § 1231), although it became a law of the United States in March, 1934, was by its terms not to be effective until the Philippine people accepted it. Formal acceptance became effective May 14, 1935."

In the *Application of Lorenzo Manantan,* Habeas Corpus No. 315 (1948), the United States District Court for the District of Hawaii in an unreported memorandum decision stated as follows:

> "The deportation statute was only for the deportation under certain conditions of persons who entered the United States as aliens and who at the time of deportation continued to be aliens. This person entered the United States lawfully as a national of the United States and continued to be such on the date of the order of deportation. Indeed, he did not become an alien despite the acceptance in 1935 by the people of the Philippines by the act of Congress granting them independence until such a time as the Republic of the Philippines was established as an independent sovereignty in 1946. Until that time, despite the general provisions of the Independence Act that the Filipinos should be treated as if they were aliens, the petitioner in point of law remained a national of the United States for he had no means of divesting himself of American nationality and could not have become an alien and citizen of the Republic of the Philippines until such time as that Government came into being."

In the Matter of the *Application of Rabaul Viloria, supra,* Judge Delbert E. Metzger concluded, though it was not necessary for his decision in that case, that non-citizen Filipinos residing in the United States are aliens. While the case of *U. S. v. Gancy,* 54 F. Supp. 755 (1944), is limited to a determination of a non-citizen Filipino's status under Section 300, Title III of the Alien Registration Act of 1940, the Court did not find that such a Filipino was an alien and this before the Philippines had gained their independence. The Court also said at p. 759:

> "Congress undoubtedly could alter the immigration and naturalization status of the Filipinos abroad and those residing here who have not become citizens."

The cases cited by the appellant in which it was held that non-citizen Filipinos are not aliens are obviously not controlling as they all pre-date the independence of the Philippines.

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### III. UNDER THE LAW OF THE REPUBLIC OF THE PHILIPPINES, THE APPELLANT IS A CITIZEN THEREOF.

The Republic of the Philippines has also adopted the rule of *jus soli.* The Constitution of the Republic of the Philippines[8] which was approved by the Presi-

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[8] "CONSTITUTION OF THE PHILIPPINES (As amended by Resolution Numbered Thirty-nine adopted by the Second National Assembly on the fifteenth day of September, nineteen hundred and thirty-nine, and approved by the President of the United States on the tenth day of November, nineteen hundred and thirty-nine, and by Resolution Numbered Seventy-three adopted by the Second Na-

dent of the United States on December 2, 1940, provides in Article IV as follows:

"ARTICLE IV.—CITIZENSHIP

"SECTION 1. The following are citizens of the Philippines:

"(1) Those who are citizens of the Philippine Islands at the time of the adoption of this Constitution.

"(2) Those born in the Philippine Islands of foreign parents who, before the adoption of this Constitution, had been elected to public office in the Philippine Islands.

"(3) Those whose fathers are citizens of the Philippines.

"(4) Those whose mothers are citizens of the Philippines and, upon reaching the age of majority, elect Philippine citizenship.

"(5) Those who are naturalized in accordance with law.

"SEC. 2. Philippine citizenship may be lost or reacquired in the manner provided by law."

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tional Assembly on the eleventh day of April, nineteen hundred and forty, and approved by the President of the United States on the second day of December, nineteen hundred and forty.)"

## IV. THE UNITED STATES BY ITS GRANT OF INDEPENDENCE TO THE PHILIPPINES HAS DEPRIVED THE APPELLANT OF NO VESTED PROPERTY RIGHT.

As discussed above, the granting of nationality status is the award of a privilege and all conditions must be met by the person claiming such privilege. The granting of independence to the Philippines which it is contended has changed appellant's status to that of an alien was not arbitrary or capricious but was an act Congress had contemplated a long time, Jones Act of August 29, 1916, c. 416, 39 Stat. 545, and was designed for the betterment of all Filipinos. This act by Congress has not subjected the appellant to banishment or exile, or any cruel and inhuman punishment. If qualified, he can still make proper application for citizenship through the medium of naturalization. If he desires to travel, the Republic of the Philippines is now an accredited nation and he can obtain the necessary travel documents from the government of the country to which his allegiance is due. It cannot be charged that appellant's freedom of speech as guaranteed under Article I of the Constitution of the United States has been abridged by his no longer having the right to say "I am an American.", for no man has a constitutional right to make an untrue statement. Nor was the granting of independence to the Philippines an *ex post facto* law, nor did it have the effect of such a law upon the appellant. *United States v. Lovett,* 328 U.S. 303, 324 (1945), *In re Chae Chan Ping,* 130 U.S. 581, 609 (1889).

## CONCLUSION.

For the foregoing reasons it is urged that the judgment of the District Court should be affirmed.

Dated, Honolulu, T. H., this 1st day of March, 1950.

Respectfully submitted,

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**(Appendix Follows.)**

# Appendix.

# PHILIPPINE INDEPENDENCE ACT
## MARCH 24, 1934
## TITLE 48 U.S.C.

Section 1238. Same; immigration; continuation of privileges.

(a) Effective upon the acceptance of this section and sections 1231-1236, 1237, and 1239-1247 of this title by concurrent resolution of the Philippine Legislature or by a convention called for that purpose, as provided in section 1247 of this title—

(1) For the purposes of chapter 6 of Title 8 (except section 213 (c)), this section, and all other laws of the United States relating to the immigration, exclusion, or expulsion of aliens, citizens of the Philippine Islands who are not citizens of the United States shall be considered as if they were aliens. For such purposes the Philippine Islands shall be considered as a separate country and shall have for each fiscal year a quota of fifty. This paragraph shall not apply to a person coming or seeking to come to the Territory of Hawaii who does not apply for and secure an immigration or passport visa, but such immigration shall be determined by the Department of the Interior on the basis of the needs of industries in the Territory of Hawaii.

Section 1244. Immigration after independence.

Upon the final and complete withdrawal of American sovereignty over the Philippine Islands the immigration laws of the United States (including all the provisions thereof relating to persons ineligible to citizenship) shall apply to persons who were born in the Philippine Islands to the same extent as the case of other foreign countries. (Jan. 17, 1933, ch. 11, §14, 47 Stat. 769; Mar. 24, 1934, ch. 84, §14, 48 Stat. 464).